UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

ROBERT S. BERRILLO and JANE M. BERRILLO, Plaintiffs v. CENTRAL MORTGAGE COMPANY, et al, Defendants	))))))))))	C.A. No. 12-544

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS COMPLAINT

Defendants, Central Mortgage Company, Mortgage Electronic Registration Systems, Inc. ("MERS"), and Deutsche Bank National Trust Company as Trustee for Downey 2004-AR2 ("Deutsche Bank"), hereby submit the following Memorandum of Law in support of their Motion to Dismiss.

I. STATEMENT OF FACTS AND TRAVEL OF THE CASE

The Complaint alleges that Central Mortgage Company did not properly foreclose its mortgage on the Plaintiffs' property and that the Plaintiffs own the property free of the mortgage.

On or about November 10, 2004, the Plaintiff Robert S. Berrillo executed an Adjustable Rate Promissory Note (the "Note") in the principal amount of $358,000.00 and delivered the same to Downey Savings and Loan Association, F.A. ("Downey"). A true and accurate copy of the Note is attached hereto as (Exhibit 1). Mr. Berrillo is the Borrower under the Note which contains specific language concerning its transferability: "I understand that the Lender may transfer this Note. The Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the ‘Note Holder.’” Thus, the parties specifically contemplated the subsequent transfer of the Note.

On or about November 10, 2004, the Plaintiffs Robert S. Berrillo and Jane M. Berrillo, to secure the obligations under the Note, executed and delivered to Downey a mortgage (the “Mortgage”) on the real estate, improvements, and fixtures located at 441 Broadway, Providence, Rhode Island, 02909 (the “Property”). A true and accurate copy of the recorded Mortgage is attached hereto as (Exhibit 2). The Mortgage was recorded with the Office of Land Evidence Records for the City of Providence in Book 6921 at Page 111, and constituted a first priority mortgage on the Property. The Mortgage contained the Statutory Power of Sale and there were no restrictions on its assignability contained therein.

Subsequently, Downey indorsed the Note in blank and Central Mortgage Company is the current holder of the Note.

On or about March 4, 2006, Downey executed an Assignment of Mortgage, evidencing the assignment and transfer of the Mortgage to MERS, its successors or assigns, as Nominee for Central Mortgage Company (the “Downey Assignment”). A true and accurate copy of the recorded Downey Assignment is attached hereto as (Exhibit 3). The Downey Assignment was executed before a witness by Crystal Moore, in her capacity as Vice President of Downey. The document was also duly acknowledged by a Notary Public and recorded with the Office of Land Evidence Records for the City of Providence on March 20, 2006, in Book 7927 at Page 316.

On or about March 24, 2009, MERS executed an Assignment of Mortgage evidencing the assignment and transfer of the Mortgage to Central Mortgage Company (the “MERS Assignment,” and collectively with the Downey Assignment, the “Assignments”). A true and accurate copy of the recorded MERS Assignment is attached hereto as (Exhibit 4). The MERS

Assignment was executed by Dorcas Tiller in her capacity as an Assistant Secretary of MERS, and was duly acknowledged by a Notary Public and recorded with the Office of Land Evidence Records for the City of Providence on April 3, 2009, in Book 9381 at Page 119.

Plaintiff Robert S. Berrillo, subsequently defaulted on his obligations under the Note and Mortgage. Central Mortgage Company, as holder of the Note and Mortgage exercised the Statutory Power of Sale. The Property was sold to Deutsche Bank, the highest bidder at a foreclosure sale held on July 1, 2011, for $242,000.00. The sale is evidenced by that Foreclosure Deed from Central Mortgage Company to Deutsche Bank, dated March 3, 2012, and recorded with the Office of Land Evidence Records on March 20, 2012, in Book 10215 at Page123 (the "Foreclosure Deed"). A true and accurate copy of the recorded Foreclosure Deed is attached hereto as (Exhibit 5). Deutsche Bank is the current record owner of the Property.

On July 20, 2012, the Plaintiffs filed their Complaint in which they assert two similar counts, the first seeking a declaratory judgment that they are the owners of the Property, and the second seeking to quiet title to the Property in their favor. By order dated November 6, 2013, upon recommendation of the Special Master, the Court removed this case from the Special Master program and lifted the "no-filing" stay. The parties have since participated in Court mandated mediation but no resolution has been reached.

II. STANDARD OF REVIEW

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* (citing *Twombly*, 550 U.S. at 555). Thus, "only a complaint that states a plausible claim for relief survives a motion to dismiss. Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679 (internal citations omitted).

Moreover, when considering a motion to dismiss, a court is not simply limited to the four corners of the complaint but can also draw upon "documents incorporated by reference in [the complaint], matters of public record, and other matters susceptible to judicial notice." *In re Colonial Mortgage Bankers Corp.*, 324 F.3d 12, 20 (1st Cir. 2003).

III. ARGUMENT

In essence, the Plaintiffs assert a number of scatter-shot allegations through which they attack the validity of the assignments in the record chain of title in an attempt to contest Central Mortgage's foreclosure of the Mortgage and Deutsche Bank's current ownership of the Property. Their Complaint, however, includes a multitude of disjointed, conflicting, and unsubstantiated statements intermingled with erroneous legal conclusions. These allegations are not to be factored in to this Court's analysis under Rule 12(b)(6). As a result, the Complaint fails to state a plausible claim for relief and must be dismissed in its entirety.

A. The Plaintiffs lack standing to contest the Downey Assignment and the MERS Assignment.

The Plaintiffs attack the validity of the underlying assignments in the record chain of title. They allege that the individuals who executed the Downey Assignment and MERS Assignment, respectively, were not authorized to do so; that there were no powers of attorney authorizing the individuals to execute the documents, and that the individuals acted as "robo-signers."

In *Culhane v. Aurora Loan Svcs. of Nebraska*, 708 F.3d 282 (1st Cir. 2013), the First Circuit, interpreting Massachusetts law, carved out an exception to the general rule that one does not have standing to challenge the validity of a contract to which he/she is not a party. The exception, however, was a narrow one. The court stated:

> We hold only that a mortgagor has standing to challenge a mortgage assignment as invalid, ineffective, or void (if, say, the assignor had nothing to assign or had no authority to make an assignment to a particular assignee). . . . Withal, a mortgagor does not have standing to challenge shortcomings in an assignment that render it merely voidable at the election of one party but otherwise effective to pass legal title.

Id. at 291. The Supreme Court of Rhode Island adopted this exception as Rhode Island law in *Mruk v. MERS*, 82 A.3d 527 (2013); *see also, Cosajay v. MERS*, C.A. No. 12-802-M, 2013 U.S. Dist. LEXIS 160294 (D.R.I. Nov. 5, 2013) Thus, whether the Plaintiffs have standing to challenge the Assignments depends upon whether their allegations would make them void or merely voidable.

The First Circuit recently analyzed the difference between a void contract and a voidable contract:

> "Void" contracts or agreements are "those . . . that are of no effect whatsoever; such as are a mere nullity, and incapable of confirmation or ratification." . . . By contrast, "voidable" refers to a contract or agreement that is "injurious to the rights of one party, which he may avoid at his election." . . . Thus, while the party injured by a voidable contract has the option of avoiding its obligations, it may choose instead to ratify the agreement and hold the other party to it.

Wilson v. HSBC Mortgage Svcs., Inc., -- F.3d --, C.A. No. 13-1298, 2014 U.S. App. LEXIS 2798, *17, (1st Cir. Feb. 14, 2014) (internal citations omitted).

As in *Clark v. MERS*, C.A. No. 12-802-M, 2014 U.S. Dist. LEXIS 42561 (D.R.I. March 27, 2014), a recent case before this Court, the Plaintiffs have not alleged such facts that would render either the Downey Assignment or the MERS Assignment void. *See also, Bishop v. Kent & Stanley Co.*, 41 A. 255, 257 (R.I. 1898) (a mortgage granted by a corporation without proper authority is voidable, not void, and subject to subsequent ratification).

According to Rhode Island Title Standard 5.3:

> Where an instrument of a private corporation appears in the chain of title, and the instrument is executed and acknowledged in proper form, it may be assumed that the persons executing the instrument were the officers they purported to be, and that such officers were authorized to execute the instrument on behalf of the corporation.[1]

The Downey Assignment clearly identifies Downey as the assignor and MERS as the assignee. The document also identifies the person executing the document to be a Vice President of Downey, and indicates that it was signed before a witness and duly acknowledged by a notary public. Similarly, the MERS Assignment identifies MERS as the assignor and Central Mortgage Company as the assignee. This document identifies the person executing it to be an Assistant Secretary of MERS, and again it is duly acknowledged by a notary public. Thus, pursuant to the Rhode Island Title Standards these assignments are assumed to have been properly authorized. Nevertheless, even if these Assignments were executed without the assignee's authorization, it would render them voidable, not void. *See Clark*, 2014 LEXIS 42561, *18-21; *see also Wilson*, 2014 LEXIS 2798, *20-23. Neither Downey, nor MERS, nor Central Mortgage Company have taken any steps to disavow the validity of the Assignments or otherwise void them. As a result, even if these Assignments were voidable, they have since been ratified.

The Plaintiffs' allegations that there are no recorded powers of attorney authorizing the signors of the Assignments to execute them does not entitle them to any relief as there is no such

[1] Although Rhode Island Title Standards are not binding authority, they are persuasive. *See Seng v. MERS*, 2013 R.I. Super. LEXIS 59, n. 2.

requirement under Rhode Island law. *See Clark*, 2014 LEXIS 42561, *21. Moreover, the Plaintiffs' allegations of "robo-signing," are equally of no avail, as again they are wholly unsubstantiated and, even if true, this would render the Assignments voidable, not void. *Id*. at *21-22.

Lastly, the Plaintiffs allege that the Assignments are void because the assignors, namely Downey and MERS, did not hold both the Mortgage and Note at the time the respective Assignments were executed. Even if true, such allegations are without merit. This argument has been raised and routinely dismissed in numerous cases. *See Culhane,* 708 F.3d at 292; *Bucci v. Lehman Bros. Bank*, 68 A.3d 1069, 1087 (R.I. 2013); *Mruk*, 82 A.3d at 537.

For these reasons, the Plaintiffs do not have standing to challenge the validity of the Downey Assignment or MERS Assignment and their Complaint must be dismissed.

B. The Plaintiffs failed to establish that Central Mortgage's foreclosure sale was improper.

Next, the Plaintiffs attack Central Mortgage's foreclosure sale of the Property and allege that Central Mortgage did not have the requisite authority to exercise the statutory power of sale under the Mortgage as it was not the original Lender. This argument is wholly without merit.

As set forth in the MERS Assignment, Central Mortgage was assigned the Mortgage on March 24, 2009, and as evidenced by the Foreclosure Deed, initiated foreclosure proceedings on or about June 14, 2010. Central Mortgage was clearly the holder of the Mortgage at the time of the foreclosure sale. As stated above, the Mortgage contained no restrictions on transfer and was thus freely assignable. *Culhane*, 708 F.3d at 292-293. Upon assignment, Central Mortgage obtained all of the rights of the assignor, including the right to exercise the statutory power of sale. *See, R.I. Constr. Svcs., Inc. v. Harris Mill, LLC,* 68 A.3d 450, 456 (R.I. 2013).

Furthermore, the Plaintiffs' allege that "The foreclosure sale was not noticed or scheduled or advertised as required by the Note and Mortgage." *See* Complaint ¶ 69. This assertion, however, is completely bald and unsupported as the Plaintiffs make no allegations as to any specific infirmities with any step in the foreclosure proceedings themselves. The Court should not consider these allegations for the purposes of this Motion. *Iqbal*, 556 U.S. at 678 ("threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."); *Twombly*, 550 U.S. at 555 ("[f]actual allegations must be enough to raise a right to relief above the speculative level.").

Therefore, the Plaintiffs' allegations are legally erroneous and implausible, and must be dismissed. *See Clark*, 2014 U.S. Dist. LEXIS 42561, *26-28.

C. Plaintiffs' broad allegations of fraud and satisfaction of the Note are bald assertions that should not be considered by this Court.

In their Complaint, the Plaintiffs allege that "[t]he note is current or has been satisfied by another third party." Also, apart from their allegations relating to the validity of the Assignments, the Plaintiffs generally allege that the mortgage and note are void due to fraud. Neither of these assertions, however, are supported by any further allegations and as such are wholly unsubstantiated and bald, and the Court should not consider them. *See Clark*, 2014 U.S. Dist. LEXIS 42561, *28-30.

IV. CONCLUSION

For the reasons set forth above, the Plaintiffs' Complaint fails to state a claim against the Defendants and should be dismissed. The Plaintiffs' allegations lack merit and do not state a plausible claim for relief. As such, the Defendants respectfully request that the Court dismiss the Plaintiffs' Complaint in its entirety.

Respectfully submitted,
CENTRAL MORTGAGE COMPANY,
MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC., and
DEUTSCHE BANK NATIONAL TRUST
COMPANY as Trustee for DOWNEY
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CERTIFICATE OF SERVICE

I hereby certify that the within document has been electronically filed with the Court this 7th day of April, 2014, and that it is available for viewing and downloading from the ECF system, and that counsel (s) of record listed below will receive notice via the ECF system:

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